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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CONSOLIDATED TESTING
LABORATORIES, INC. et al.,

Plaintiffs and Appellants,

v.

SENECA INSURANCE COMPANY, INC.,

Defendant and Appellant.

F055672

(Super. Ct. No. 04-211596)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Parichan, Renberg & Crossman, Richard C. Crossman, Michael J. Renberg; and Ray T. Mullen for Plaintiffs and Appellants.

Shea Stokes Roberts & Wagner, Shirley A. Gauvin, Emily J. Fox; Lebeau Thelen, Dennis R. Thelen and Steve Shayer for Defendant and Appellant.

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In this action arising out of the alleged breach by Seneca Insurance Co., Inc. (Seneca) of its duty to defend and indemnify its insured, Consolidated Testing Laboratories, Inc. (CTL), the pivotal issue before the jury was whether or not CTL, through its president, David Harris, misrepresented on the insurance application that he had no knowledge of any fact, circumstance or situation that could result in a claim against CTL. At the time the application was filled out, CTL had recently performed work as the asphalt testing subcontractor on a large construction project in which the project owner, the United States Forest Service (the Forest Service), expressed strong dissatisfaction with the quality of the asphalt and demanded that the general contractor, S.C. Anderson, Inc. (SCA), remove and replace it. Because that unresolved asphalt dispute was not disclosed by Harris on the insurance application, when SCA later sued CTL for alleged failures in testing the asphalt, Seneca contended that CTL had misrepresented the facts thereby justifying a denial of coverage to CTL. The jury disagreed with Seneca, found that Harris did not conceal material facts on the insurance application, and concluded that Seneca was liable for its failure to provide coverage to CTL. Since CTL had settled SCA's lawsuit against it by agreeing to a stipulation for entry of judgment in SCA's favor in the amount of \$985,000 and the jury found no collusion was involved therein, the trial court entered judgment in the present action against Seneca in that sum, less appropriate offsets, in favor of CTL.¹

Following entry of judgment, Seneca moved for a new trial, for judgment notwithstanding the verdict (JNOV) and to vacate the judgment. One of the issues raised

¹ Although the pleadings and judgment refer to CTL as the plaintiff, we note that CTL previously assigned all of its rights against Seneca to SCA. Thus, CTL was the plaintiff in a nominal sense, and SCA was and is the real party in interest as CTL's assignee. The same is true on appeal. For the sake of simplicity, our discussion refers to CTL as being the plaintiff below, the respondent herein (in the main appeal) and the cross-appellant in the cross-appeal, but we recognize SCA's status as assignee.

in the new trial motion was CTL's failure to present evidence to support a discrete component of the damage award—what we have referred to as the Mitch Brown component.² The trial court denied Seneca's motions. Seneca appeals from the judgment and from the denial of its postjudgment motions, while CTL cross-appeals regarding issues of prejudgment interest and costs. We will affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

CTL's Role as Testing Subcontractor

CTL is a company that performs testing of materials, including sampling and testing of the composition, density and other characteristics of asphalt. In late 2000, SCA, the general contractor on a Forest Service construction project at the Porterville Air Attack Base (the project), hired CTL as its subcontractor to test the asphalt used on the project. CTL was to perform quality control testing, which included testing of the aggregates, oil content, and compaction. Another company, Mitch Brown Construction, Inc. (Mitch Brown), was hired by SCA to supply the asphalt to the project formulated pursuant to an approved "mix design," and to do the actual paving work. Mitch Brown, in turn, subcontracted its responsibilities to Glen Wells Construction Company, Inc. The project included extensive asphalt cement paving of designated areas of the air base such as portions of the runway apron and taxiways used by firefighting aircraft.

Events Leading to Seneca's Denial of Insurance Coverage

In June of 2001, after most of the new asphalt was in place, the Forest Service communicated to SCA that the quality of the asphalt paving was unsatisfactory. The Forest Service noticed that the asphalt was apparently degrading when used by relatively lightweight vehicles, and questions were raised regarding the compaction or density of the asphalt and whether the asphalt met the contract specifications. A portion of the

² We interpret Seneca's contention that there was insufficient evidence to support the Mitch Brown damage award to mean that there was insufficient evidence that CTL was legally liable for the Mitch Brown damages.

ensuing dispute focused on whether the asphalt was the proper “mix design” and on whether the asphalt should have been tested using a Caltrans testing method versus another testing method (referred to as an “AASHTO” test method). In any event, the bottom line was that the Forest Service did not approve of the quality of the asphalt, and on August 2, 2001, it issued a “WORK ORDER AND NOTICE OF NONCOMPLIANCE” directing SCA to remove and replace the “defective” asphalt cement. In early October of 2001, the Forest Service received results from its own testing company that allegedly showed the asphalt did not meet the contract specifications and did not conform to the required mix design.

SCA asked its subcontractors, CTL and Mitch Brown, to provide information that would assist SCA in resolving the asphalt dispute. CTL’s president, David Harris, wrote a detailed letter to SCA on October 23, 2001, explaining as follows: the proper testing method was used on the asphalt (i.e., a Caltrans mix design necessitated a Caltrans test method); the Forest Service’s representative, Olin Beall, previously agreed to such testing method; the test results had been reported and approved; and the only tests not performed were those that Beall expressly instructed CTL not to perform. In addition, Harris’s letter pointed out that Beall did not allow the asphalt contractor to use roller equipment that was needed for surface completion and to facilitate compaction. This information was forwarded by SCA to the Forest Service.

Meetings were held in September and December of 2001 that included personnel from the Forest Service, SCA, Mitch Brown and CTL, but the dispute was not resolved. At the December 2001 meeting, the Forest Service did not deny that it had approved a Caltrans design mix for the project, but the Forest Service remained dissatisfied because the quality of the asphalt product in place was not what it understood it would be getting. Tempers flared and angry words were exchanged at that meeting.

In May of 2002, David Harris applied to Seneca for a liability insurance policy on behalf of CTL that would include professional liability coverage for claims of actual or

alleged negligent acts, errors, or omissions arising out of professional services rendered by CTL. Harris was asked in Question 13 on the insurance application if he was “aware of any fact, circumstance or situation that could result in a claim being made” against CTL. He responded “No,” and Seneca agreed to issue the policy effective on May 29, 2002. The policy covered CTL for negligent acts or omissions occurring on or after a retroactive date of May 21, 2000.

David Harris testified that in May of 2002, when he filled out the insurance application, he believed that the asphalt dispute did not call into question any work done by CTL. No one had pointed a finger of blame at CTL or suggested that CTL had done anything wrong. It was common knowledge that use of a Caltrans asphalt mix design required testing pursuant to Caltrans methods, which is exactly what CTL did, so he did not believe any problem existed on that front. Moreover, he understood the issue had to do with the mix design itself, not testing, and it appeared to Harris that the dispute was entirely between the Forest Service and SCA. Along the same lines, SCA’s president, Steven Anderson, and SCA’s project manager assigned to the project, Chuck Paul, testified that SCA had no dispute with CTL in the time period of 2001 through October of 2002, since the problem appeared to relate solely to the mix design of the asphalt. Following the December 2001 meeting referred to above, SCA did not copy CTL on any further correspondence regarding the progress of the discussions between SCA and the Forest Service because there was no reason to do so.

SCA’s position changed in October of 2002. On October 30, 2002, SCA’s attorney, Kenneth Kind, sent a letter to CTL advising that a claim was being made by Mitch Brown (and possibly by the Forest Service) against SCA relating to the asphalt at the Porterville Air Attack Base. The letter stated that Kind understood that CTL failed to core test the asphalt and failed to use the correct maximum density for determination of

compaction, and that such testing deficiencies were learned of by SCA on October 28, 2002.³ In light of these developments, the letter asked CTL to “tender this matter” to CTL’s insurance carrier immediately. That is, SCA was asserting that CTL was responsible for the damages being claimed and therefore CTL’s carrier needed to provide a defense and indemnity to SCA. On February 11, 2003, Kind forwarded to CTL a copy of Mitch Brown’s complaint against SCA and demanded that CTL provide a defense and indemnification to SCA thereof through CTL’s insurance carrier. Within that same time frame of late 2002 or early 2003, SCA hired a new testing company to independently test the in-place asphalt. The results allegedly revealed that CTL failed in its testing obligations on the project. In June of 2003, SCA agreed to the Forest’s Service’s demands and removed and replaced the asphalt.

SCA’s claims against CTL were tendered to Seneca, and Seneca initiated an investigation to determine if coverage existed. In August of 2003, after reviewing the documentation concerning the asphalt dispute and conducting an examination under oath of David Harris and CTL employee Shannon Bennett, Phil Collins recommended that Seneca deny coverage to CTL on the ground that CTL had concealed the existence of the asphalt dispute on the insurance application. Seneca followed that recommendation and refused to defend or indemnify CTL for SCA’s claims arising out of the asphalt dispute. When SCA’s lawsuit against CTL was commenced in 2004, CTL tendered the defense of the action to Seneca. Seneca again denied coverage based on what it viewed as a plain misrepresentation by CTL on the insurance application.

³ There was testimony from Phil Collins, a California attorney who conducted a coverage investigation on behalf of Seneca, that Kind later told him the October 28, 2002 date mentioned in the letter was a typographical error and that SCA actually learned of such matters in 2001. Kind subsequently died in a motorcycle accident.

Contractor Lawsuits Arising Out of Asphalt Dispute

In late 2002, Mitch Brown filed a complaint in federal court against SCA for damages incurred because Mitch Brown had not been paid in full for its asphalt work after the Forest Service had stopped paying SCA. CTL was not named as a defendant therein. The parties settled that lawsuit on the day of trial. The terms of the settlement were that Mitch Brown received a stipulated judgment for damages and a promise that the amounts due would be paid to Mitch Brown out of any recovery SCA obtained against CTL. As part of the settlement, Mitch Brown assigned its rights against CTL (if any) to SCA.

On May 28, 2004, SCA filed a complaint against CTL for damages allegedly caused by CTL's failure to meet its testing obligations on the project. SCA sued on its own behalf and as assignee of the rights of Mitch Brown. The complaint alleged various categories of damages to SCA and Mitch Brown as a result of CTL's failure to properly test the asphalt. Allegedly, SCA and Mitch Brown had relied on CTL's testing to make sure the asphalt was within contract specifications, and CTL's flawed or nonexistent testing caused the alleged damages. As noted above, Seneca denied coverage to CTL concerning SCA's lawsuit. In an effort to settle the case, mediation was conducted involving SCA, Mitch Brown, CTL, and Seneca (even though it had denied coverage). Seneca excused itself from the mediation before any settlement was reached. The remaining parties reached a settlement, the terms of which were that a stipulated judgment would be entered in favor of SCA and against CTL in the amount of \$985,000, SCA promised not to enforce the judgment against CTL, and CTL assigned all of its rights against Seneca to SCA. CTL also agreed to cooperate in the prosecution of the lawsuit against Seneca. The \$985,000 settlement figure included, as a component thereof, the sum of \$335,000 allegedly owed to Mitch Brown for unpaid asphalt work performed on the project and for attorney fees incurred by Mitch Brown in seeking to enforce its right to payment for that asphalt work. A formal settlement agreement was

executed by the parties on October 30, 2006. A Stipulation for Entry of Judgment was filed on February 22, 2007, and on that same date a judgment in favor of SCA and against CTL was entered in the amount of \$985,000.

The Present Action Versus Seneca

On September 20, 2004, CTL filed the instant action against Seneca alleging that Seneca breached its duty under the liability insurance policy to defend and indemnify CTL and further alleging that Seneca's conduct was in bad faith.

The case proceeded to trial by jury in March of 2008. CTL attempted to prove that Seneca was liable for its breach of duty to defend and indemnify CTL, and that as a result of that breach Seneca was required to pay the full amount of the stipulated judgment entered in the SCA versus CTL case. Seneca attempted to show that its refusal to provide coverage to CTL was justified because of CTL's misrepresentation or concealment of a material fact (i.e., the asphalt dispute) on the insurance application. Seneca also argued that the stipulated judgment entered in the SCA versus CTL case was the product of collusion. In terms of trial time and emphasis, the primary focus of the trial was the question of whether or not David Harris, when he filled out the insurance application in May of 2002, knew of any fact, circumstance or situation that could result in a claim against CTL.

A verdict was reached on March 27, 2008. The special verdict form asked the jury to decide whether, "As of May 29, 2002, ... David Harris or any employee of [CTL] [knew] of a fact, circumstance or situation that could result in a claim against [CTL.]" The jury responded, "No." The jury also specifically found that Seneca breached its contractual duty to "either provide a defense to the claim or lawsuit and/or indemnity to [CTL]," that Seneca further breached the covenant of good faith and fair dealing, and that the settlement agreement and stipulated judgment in the underlying SCA versus CTL case was not the product of collusion between SCA and CTL. Based on the jury's findings, on April 1, 2008, the trial court entered judgment in favor of CTL and against

Seneca in the amount of \$959,000, which sum represented the \$985,000 stipulated judgment less a \$26,000 offset for a settlement entered with another defendant.

Postjudgment Motions

On April 28, 2008, Seneca filed a motion for new trial, a motion for JNOV, and a motion to vacate the judgment. The motion for new trial asserted, among other things, that there was no factual basis to include the Mitch Brown component (\$335,000) of the stipulated judgment in the damage award, and further, that the verdict was not supported by the evidence because a “judicial admission” contained in the complaint filed in the SCA versus CTL case established that CTL was aware “[f]rom August, 2001” of the potential claim against it in connection with the asphalt dispute. Seneca’s motion for JNOV challenged the judgment based on the insufficiency of the evidence to support the special verdict that CTL did not know of a fact, circumstance, or situation that could result in a claim against it. The motion for JNOV was based, in part, on the asserted “judicial admission.” Seneca’s motion to vacate the judgment was made on the grounds that it was error to enter judgment in favor of CTL since SCA was the real party in interest and that it was improper to award *any* damages because the jury made no findings on the issue of the amount of damages.⁴ On May 28, 2008, the trial court denied all three motions, explaining that “This court cannot find that, based on the entire record, including reasonable inferences therefrom, that the jury clearly should have reached a different verdict.”

Other motions were made that related to recoverable costs and interest. CTL moved for prejudgment interest from the date of the settlement of the SCA versus CTL case. It requested prejudgment interest from that date (i.e., April 20, 2006) rather than

⁴ On the special verdict form, the jury was asked to decide whether the settlement and stipulated judgment in SCA versus CTL was the product of collusion. The jury was not asked to decide an amount of damages.

from the date on which the stipulated judgment was actually entered (i.e., February 22, 2007). The trial court granted prejudgment interest, but held that such interest would run from February 22, 2007. The trial court also granted Seneca's motion to tax a particular item of costs.

On June 9, 2008, Seneca filed its notice of appeal from the judgment and from the trial court's denial of its postjudgment motions. On June 23, 2008, CTL filed a notice of cross-appeal on the issues of prejudgment interest and costs.

DISCUSSION

I. Seneca's Appeal

Seneca appeals on the following grounds: (1) there was no evidentiary basis for the inclusion of the \$335,000 Mitch Brown component in the verdict or judgment against Seneca, thus its motion for new trial of damages should have been granted; (2) the trial court erred in failing to hold that there was a judicial admission that CTL had knowledge of the potential claim prior to applying for insurance coverage; and (3) the trial court prejudicially abused its discretion in failing to compel testimony of the Forest Service personnel. We address each of these contentions in turn.

A. Mitch Brown Component of Damage Award

Seneca argues the award of damages against it should not have included the \$335,000 "Mitch Brown component" of the stipulated judgment. Seneca raised the issue below in a motion for new trial on the grounds that the evidence was insufficient to justify the verdict or other decision and/or that the damages were excessive. (Code Civ. Proc., § 657, subds. (5) & (6).) In that motion, Seneca argued there was insufficient evidence presented at trial to support the inclusion of the Mitch Brown component in the judgment against Seneca because there was no evidence that CTL was in a contractual relationship with Mitch Brown. According to Seneca, the \$335,000 constituted amounts owed by SCA to Mitch Brown pursuant to SCA's contract with Mitch Brown, plus attorney fees incurred in the Mitch Brown versus SCA lawsuit, and no basis was

presented at trial for CTL to be liable to Mitch Brown for those obligations. Hence, Seneca contended that the Mitch Brown component of the settlement was *unreasonable* and thus it was error to incorporate it into the damages awarded against Seneca (as CTL's liability insurer). On appeal, Seneca now raises those same arguments and contends the trial court erred in denying its motion for a new trial on the issue of damages.⁵ We reject Seneca's contentions.

“When a trial court rules upon a motion for a new trial made upon the ground of insufficiency of the evidence, the judge is required to weigh the evidence and judge the credibility of witnesses. In so doing, the court may disbelieve witnesses and draw inferences contrary to those supporting the verdict. [Citation.] Nonetheless, a new trial cannot be granted ‘... unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, *that the court or jury clearly should have reached a different verdict or decision.*’ (Code Civ. Proc., § 657, italics added.) And denial of such motion will not be disturbed on appeal unless it is manifest that said ruling was an abuse of discretion. [Citation.] [¶] ... [¶] In reviewing the trial court's exercise of its discretion, this court, unlike the trial court, does not weigh the evidence; our power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the jury's verdict. [Citation.]” (*Locksley v. Ungureanu* (1986) 178 Cal.App.3d 457, 463; accord, *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 215; *Charles D. Warner & Sons, Inc. v. Seilon, Inc.* (1974) 37 Cal.App.3d 612, 616-617.)

As we shall explain presently, the question of whether the evidence was sufficient to support the inclusion of the Mitch Brown component of the stipulated judgment in the

⁵ A denial of a motion for new trial is not itself an appealable order, but it may be reviewed in an appeal from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19-22.) That is the case here.

damage award against Seneca must be analyzed within the framework of the law relating to an *evidentiary presumption* available in cases where, as here, an insurer has wrongfully denied coverage or a defense to its insured. We now consider that important evidentiary presumption and its application in this case.

“Courts have for some time accepted the principle that an insured who is abandoned by its liability insurer is free to make the best settlement possible with the third party claimant, including a stipulated judgment with a covenant not to execute. Provided that such settlement is not unreasonable and is free from fraud or collusion, the insurer will be bound thereby.” (*Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500, 515 (*Pruyn*).) This means that “[i]n a later reimbursement action against the insurer, based upon a breach of the contractual obligation to provide a defense, ‘a reasonable settlement made by the insured to terminate the underlying claim ... may be used as *presumptive evidence* of [1] the insured’s liability on the underlying claim, and [2] the amount of such liability. [Citations.]” (*Ibid.*, citing *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 791.)

Before that presumption arises, however, the insured (or the insured’s assignee) must make a foundational showing. “[T]o demonstrate the right to rely on such presumption, an insured should be required to establish certain basic or foundational facts. We believe they are three in number: (1) the insurer wrongfully failed or refused to provide coverage or a defense, (2) the insured thereafter entered into a settlement of the litigation which was (3) reasonable in the sense that it reflected an informed and good faith effort by the insured to resolve the claim.” (*Pruyn, supra*, 36 Cal.App.4th at p. 528.) Once the insured produces evidence of these basic or foundational facts, the presumption applies and the burden of proof shifts to the insurance company to persuade the trier of fact, by a preponderance of the evidence, that the settlement did not represent a reasonable resolution of plaintiff’s claim or that the settlement was the product of fraud

or collusion. Unless the insurance company meets that burden, the stipulated judgment will be binding upon it. (*Id.* at pp. 530-531.)⁶

Because of its importance herein, we reiterate that before the insured is entitled to the benefit of the evidentiary presumption, he or she must satisfy the prima facie burden of showing, among other things, that the settlement was *reasonable* in the sense that it reflected an informed and good faith effort by the insured to resolve the claim. (*Pruyn, supra*, 36 Cal.App.4th at p. 528.) That is, the settlement must be “*reasonable* in the sense that it reflected an informed and good faith effort by the settling parties to reconcile their presumably differing views as to the relative strengths of their respective claims and defenses.” (*Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 545 (*Xebec*).) Reasonableness is assessed “from the perspective of the *insured* who (or whose assignee) will thereafter seek to compel the insurer to pay or to reimburse the settlement amount.” (*Id.* at p. 554.) Generally, the insured can satisfy its burden of showing a settlement was reasonable by presenting the same kind of evidence that would support a determination of good faith under Code of Civil Procedure section 877.6. (*Pruyn, supra*, at p. 528 [factors listed].) Factors bearing on the issue of reasonableness of the settlement would include an assessment of the insured’s potential proportionate liability (*ibid.*; see *Xebec, supra*, at pp. 554-555 [“an insured must have informed himself or herself adequately as to the nature and viability of the third party’s claims against him or her”]), the estimated cost of defending the action and paying the amount of the claim discounted by any reasonable likelihood that the third party will not prevail (*Xebec, supra*, at p. 555), the amount of the overall settlement in light of the value of the case, the facts known to the settling insured at the time of the settlement, the

⁶ As clarified in *Pruyn, supra*, 36 Cal.App.4th at page 528, footnote 25, collusion and fraud are in the nature of affirmative defenses that the insurer has the burden of proving once the insured meets its prima facie burden of showing the settlement was reasonable.

presence of a covenant not to execute as part of the settlement, and the failure of the insured to consider viable defenses (*Andrade v. Jennings* (1997) 54 Cal.App.4th 307, 330-331).

In the trial below, CTL took the position that Seneca must pay as damages the entirety of the stipulated judgment, including the Mitch Brown component, based on the above-stated evidentiary presumption. Seneca's position was that the evidentiary presumption did not apply because there was collusion, and it pointed to the Mitch Brown component as indicating the settlement was tainted by collusion. After the jury found in its special verdict that there was no collusion, the trial court applied the evidentiary presumption and awarded damages based on the stipulated judgment.

In its appeal, Seneca argues that the evidentiary presumption upon which its adversary (and the trial court) relied was inapplicable with respect to the Mitch Brown component of the stipulated judgment due to lack of evidence of *reasonableness*. Specifically, Seneca contends that the inclusion of the Mitch Brown damages in the settlement was not reasonable because there was no evidence of a contractual relationship or other legal nexus to indicate that CTL was potentially liable to Mitch Brown for the claimed sum (\$335,000). CTL responds that an insured need not prove actual liability, but only that the settlement was reasonable under the circumstances. Further, CTL claims the settlement *was* reasonable since it was abandoned by Seneca and was forced to make the best deal that it could under the circumstances.

The essential issue before us, then, is whether there was substantial evidence to support a finding that the Mitch Brown component of the settlement was *reasonable* for purposes of the evidentiary presumption. On that issue, we agree that what must be shown is the reasonableness of the settlement, not the insured's actual liability. Nevertheless, a significant factor on the question of reasonableness would be the existence of any evidence tending to show that the insured was at least *potentially* liable (and the approximate extent thereof) on a tenable legal theory with respect to the settled

claim. (See *Pruyn*, *supra*, 36 Cal.App.4th at p. 528; *Xebec*, *supra*, 12 Cal.App.4th at pp. 545, 554-555.) If, as Seneca now contends, no evidence or argument was presented to the jury to suggest a potential basis for CTL's liability to Mitch Brown for the Mitch Brown component of the underlying settlement, we do not believe the foundational showing of reasonableness would be met as to that distinct portion of the settlement. Nevertheless, as will presently be seen, it is one thing to state such a contention in the abstract and quite another to demonstrate its applicability in a particular case such as this one.

Preliminarily, we note the jury was informed that there were two distinct components of the stipulated judgment entered pursuant to the settlement of the SCA versus CTL lawsuit—namely, (1) the claim by SCA of \$650,000, and (2) the claim by Mitch Brown (assigned to SCA) of \$335,000. Concerning these sums, testimony at trial showed that SCA's claimed damages of \$650,000 included the cost of hiring another company to remove and replace the asphalt, the expense of independent testing of the asphalt, two years' worth of lost interest during the time the Forest Service held up payments, and attorney fees incurred. Mitch Brown's claim of \$335,000 was based on nonpayment of \$165,000 that was owed by SCA to Mitch Brown for the paving work performed pursuant to Mitch Brown's contract with SCA, plus attorney fees incurred by Mitch Brown in prosecuting its lawsuit against SCA to recover said unpaid amount due under the contract.⁷

The thrust of Seneca's argument that it was unreasonable to include the Mitch Brown component in the settlement is that the \$335,000 could not have become a potential liability of CTL because it arose out of a separate contractual obligation between SCA and Mitch Brown. We disagree with Seneca's oversimplified

⁷ The \$165,000 payment due to Mitch Brown represented the final sum owed by SCA on a total contract of approximately \$1 million for the paving work.

characterization of the issue because there was much more involved under the totality of the circumstances presented to the jury than a simple nonpayment on a contract between SCA and Mitch Brown. Indeed, from the standpoint of the insured (CTL), there were reasonable grounds to believe it could potentially be found liable for the Mitch Brown component, as we now explain.

First, CTL was served with SCA's complaint, which alleged on SCA's own behalf *and* as assignee of Mitch Brown Construction, that CTL had materially failed to perform its asphalt testing obligations and, as support for that assertion, a number of fact-specific failures to test were alleged in said complaint. Further, according to SCA's complaint, Mitch Brown's distinct claim was based on "[t]he theory ... that [Mitch Brown] was relying upon the testing by CTL to advise [Mitch Brown] whether the asphalt, *as it was being placed*, met the Project's plans and specifications," and further that "CTL consistently represented to Mitch Brown ... that the asphalt being placed was properly compacted and met the plans and specifications." (Italics added.) Allegedly, had Mitch Brown known that the asphalt being placed was not meeting the Project's plans and specifications, it could have taken appropriate measures or made timely adjustments to its work and "stopped the supply and installation of the asphalt and corrected the quality and compaction of the asphalt" Based on these and related allegations, SCA's complaint against CTL set forth theories of liability for recovery of the Mitch Brown component that a reasonable insured would have to take seriously, including causes of action for negligent misrepresentation, breach of third party beneficiary contract, and express indemnity.⁸

⁸ It is unnecessary to decide whether SCA would ultimately prevail on these theories. For purposes of analyzing the issue of reasonableness in this case, we consider it to be adequate that the allegations presented plausible theories of liability from the rational vantage point of the insured, and that the insured (CTL) was therefore forced to deal with and resolve such claims in the settlement.

Second, and perhaps most importantly, the evidence showed that CTL had an express contractual obligation to indemnify SCA. The indemnity cause of action in SCA's complaint against CTL was premised on the following broad indemnity provision: "[CTL] shall indemnify [SCA] against, defend, and save [SCA] harmless for any and all loss, injury, claims, proceedings, liability, damages, fines, penalties, costs and expenses (including legal fees and disbursements) caused, suffered or incurred on account of [CTL's] failure to comply, directly or indirectly, with any of its responsibilities and obligations under this Subcontract." The indemnity provision was alleged in SCA's complaint served on CTL; it was part of CTL's subcontract with SCA; and it was referenced at trial in the testimony of Robert Anderson. In light of the broad scope of this indemnity provision, we believe that the insured, CTL, had a reasonable basis to conclude there was a serious risk it would be found liable for payment of the Mitch Brown component under the indemnity cause of action, and thus it was clearly reasonable for CTL to agree to a comprehensive settlement that included that amount.

Third, although the evidence presented at trial on the issue of testing was arguably subject to differing explanations as to its significance, there was nevertheless sufficient evidence on that subject to permit a reasonable conclusion that CTL materially failed to perform its testing responsibilities under its subcontract with SCA. At the very least, a reasonable basis existed under the evidence to *potentially* support such a claim. Among other things, we note there was evidence of failure to perform certain core testing of asphalt, and there were independent tests conducted that allegedly showed CTL's testing results were not accurate and that the asphalt was not within contract specifications. Certainly, CTL was aware of such a tenable factual basis against it when it entered into the settlement.

Fourth, and finally, we cannot ignore that at the time of the settlement negotiations, SCA demanded that the settlement include the entire Mitch Brown component. At the settlement conference, SCA presented a spreadsheet detailing the

amount claimed as damages by SCA and Mitch Brown, and it refused to settle for anything less than the full \$985,000. The alternative for CTL was to proceed with an expensive trial in which damages of nearly \$1 million were being claimed and that, if CTL lost, would financially bankrupt CTL and risk personal liability against its principals.

Under all the circumstances, we cannot say that it was unreasonable for CTL to include the Mitch Brown component in the settlement. Moreover, there was sufficient evidence before the jury to support a finding that the settlement, including the Mitch Brown component, was a reasonable one in the sense that it reflected an informed and good faith effort by the insured to resolve the claim. (*Pruyn, supra*, 36 Cal.App.4th at p. 528.)⁹ This ground for Seneca's appeal fails.

B. Judicial Admission

Next, Seneca contends there was a judicial admission in SCA's complaint against CTL that conclusively established the fact that CTL knew of the potential asphalt claim against it before the application for insurance was filled out. In a pretrial motion in limine, the trial court ruled that the complaint was admissible as evidence and Seneca was free to argue to the jury that the allegations were admissions, but the trial court stopped short of finding any binding judicial admission. After trial, Seneca briefly reiterated its judicial admission argument in the motion for JNOV, which motion was

⁹ Although we initially raised the question of apparent double recovery regarding the damage award and asked the parties to provide supplemental briefing to address that potential issue, we conclude that we are unable to adequately evaluate that issue on the record before us. To the extent there was a basis for objection to the damage award based on an alleged double recovery, it should have been raised in the trial court in the first instance, where all the facts and circumstances and inferences relating to the damage award could have been fully explored and considered by the trial court and parties. Since that issue was not properly raised in the trial court or addressed in Seneca's opening or reply briefs, we conclude that it has been waived or forfeited for purposes of appeal. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.)

denied. On appeal, Seneca argues the trial court prejudicially erred by its failure to find the referenced allegations constituted a judicial admission of CTL's knowledge of the potential claim. We disagree.

"A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 47 (*Gelfo*)). An admission of fact in a pleading constitutes a judicial admission that is conclusive against the pleader. (*Valerio v. Andrew Younquist Construction* (2002) 103 Cal.App.4th 1264, 1272, 1274 (*Valerio*); 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 454, p. 587.) However, equivocal or ambiguous allegations will not be treated as a judicial admission. (*Gelfo, supra*, at p. 48 [to constitute judicial admission, the concession of fact must be "unequivocal"]; *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067 ["Because [the defendant's] summary judgment motion was based solely on the ambiguous allegation of the complaint, it merely showed that the action may have been, but was not certainly, barred. [Thus,] it was, therefore, error to grant summary judgment"]; see also *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482 ["fragmentary and equivocal concessions" insufficient to constitute admissions].)

The allegations that Seneca contends are judicial admissions were set forth in SCA's complaint against CTL at paragraphs 21 and 22 thereof, and stated as follows:

"21. From August, 2001 to June, 2003, [SCA] continually requested CTL to assist and resolve the dispute with [the Forest Service] regarding the asphalt.

"22. CTL refused to accept responsibility for any of its work, refused to acknowledge there was any defective workmanship and, finally, continued to represent to [SCA] that the asphalt which was in place was in compliance with the Project's plans and specifications."

Seneca's position is that the above allegations amount to a binding admission (in the present lawsuit) that CTL knew, beginning in August of 2001, there was a potential

basis for a claim against it. If Seneca is correct, the admission would presumably establish Seneca's defense that CTL concealed the potential claim when it filled out the insurance application.

For two reasons, we find that the above allegations did not constitute a judicial admission of CTL's prior knowledge or awareness of potential claims against it. First, a concession of fact in a pleading is conclusive *on the pleader*. (*Valerio, supra*, 103 Cal.App.4th at p. 1272.) Here, SCA was the party who made the above allegations, not CTL; therefore, the allegations are not admissions on the part of CTL.¹⁰ Although it is true that SCA is the assignee of CTL's rights, its status as assignee does not mean that SCA's prior allegations are now attributable to CTL. Second, the allegations were insufficient to constitute a judicial admission because they were equivocal and ambiguous in a number of material respects. Paragraph 21 of the complaint merely set forth certain dates as a time frame for SCA's *requests* that CTL provide assistance in resolving the dispute with the Forest Service. Requests for assistance do not necessarily mean that CTL is being accused of doing anything wrong or that it was aware of facts of a potential claim against it. Paragraph 22 then accused CTL of a failure to accept responsibility, among other things, but the time frame thereof is unstated and is unclear, particularly when it was stated in paragraph 23 that SCA did not become aware CTL's testing results were inaccurate until the spring of 2003. In light of such substantial ambiguity, the referenced allegations are patently inadequate to establish the asserted admission.

We conclude that the trial court did not err in its failure to find the above allegations were judicial admissions of CTL's prior knowledge of the existence of potential claims against it.

¹⁰ There is no contention that the allegations were admitted by failure to deny the allegations in an answer.

C. Failure to Compel Forest Service Personnel to Testify

Seneca contends the trial court abused its discretion by refusing to order the deposition testimony of Forest Service employees Beall and Ruggeri. We disagree.

We review discovery orders under an abuse of discretion standard. (*Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 245.) An exercise of discretion will not be disturbed on appeal unless it is shown that a clear abuse of discretion resulted in a miscarriage of justice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) Moreover, a judgment will not be reversed on the basis of such an error unless prejudice is affirmatively demonstrated. (Code Civ. Proc., § 475; Cal. Const., art. VI, § 13.) Prejudice is not presumed and the burden is on the appellant to show its existence. (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1038.)

The discovery dispute alluded to by Seneca actually began in 2005, when Seneca served deposition subpoenas on two employees of the Forest Service, an agency that is a part of the United States Department of Agriculture (USDA). The two employees (i.e., Nancy Ruggeri and Olin Beall) were subpoenaed to testify at depositions on June 30, 2005, based on their involvement on the project and their knowledge of facts relating to the asphalt dispute. On June 27, 2005, a letter from the USDA's legal counsel informed Seneca that the USDA had determined the two employees would not be given permission by the USDA to testify in the action, citing as authority certain federal regulations and case law, and on that basis the USDA requested that the subpoenas be withdrawn. In response, Seneca withdrew the deposition subpoenas and did not move to compel the employees' depositions or otherwise challenge the USDA's determination in either state or federal court.

On March 23, 2007, Seneca filed a motion seeking an order to require SCA "TO PRODUCE NANCY RUGGERI AND OLIN BEALL FOR DEPOSITION," even though Ruggeri and Beall were known to be employees of the Forest Service/USDA. The basis

for Seneca's motion was that SCA had entered into a settlement agreement with the Forest Service, and under the terms of that settlement agreement, the Forest Service had given authorization for Ruggeri and Beall to testify at the request of SCA. In essence, Seneca wanted the trial court to require SCA to "produce" Ruggeri and Beall as deposition witnesses, by means of forcing SCA to exercise (for Seneca's benefit) the discretionary provision of the settlement agreement between SCA and the Forest Service. The trial court refused to do so, explaining it had no authority under the code to force a party (or its assignee) to produce witnesses for deposition under a third party beneficiary theory: "The court agrees with [SCA], that [Seneca] is trying to obtain the advantage of a contract between the Assignee SCA ... and the Forest Service as a third party beneficiary. [¶] [T]he court finds it has no authority to grant this motion, and denies the motion."

We agree with CTL that the discovery dispute was in reality between Seneca and the USDA, since the two witnesses were employees of and under the authority of the Forest Service/USDA. If Seneca believed that the USDA should have permitted the two employees to be deposed by Seneca, judicial remedies were available as indicated by the case law cited in Seneca's briefs. (See, e.g., *Exxon Shipping Co. v. United States Dept. of Interior* (9th Cir. 1994) 34 F.3d 774, 780; *Dent v. Packerland Packing Co., Inc.* (D.Neb. 1992) 144 F.R.D. 675, 679.) Seneca did not pursue those judicial remedies against the USDA. Instead, it sought recourse against SCA, trying to enforce the benefit of a settlement agreement between SCA and the Forest Service. Seneca has not shown that any discovery rule or statute required the trial court to issue the particular order it sought. We conclude that Seneca has failed to show a clear abuse of discretion or a miscarriage of justice. In any event, since no one knows what the two employees would have said in their depositions, it is mere speculation that their testimony would have been helpful to either side, much less that their testimony would have resulted in a more favorable result

for Seneca. Thus, even if there was error, Seneca has failed to demonstrate prejudice. This ground for Seneca's appeal fails.

II. CTL's Cross-Appeal

In its cross-appeal, CTL claims the trial court erred in (1) determining the effective date for calculation of prejudgment interest, and (2) taxing certain costs. We now address those particular issues.

A. Prejudgment Interest

After judgment was entered, CTL brought a motion for prejudgment interest. The motion was based on Civil Code section 3287, subdivision (a), which provides in relevant part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day" CTL requested that the trial court award prejudgment interest from the date of the settlement of the SCA versus CTL case (i.e., from April 20, 2006). The trial court granted prejudgment interest, but held that such interest would run from February 22, 2007, the date on which the stipulated judgment (pursuant to the settlement) was entered in that case.

The sole issue raised in CTL's cross-appeal is the applicable *date* of prejudgment interest. CTL contends the trial court erred when it failed to award prejudgment interest *from the earlier date* of April 20, 2006 (i.e., the initial date of the settlement), because according to CTL the amount of damage was allegedly certain or capable of being made certain at that time. We disagree.

"Damages are deemed certain or capable of being made certain within the provisions of subdivision (a) of [Civil Code] section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage." (*Esgro Central, Inc. v. General Ins. Co.* (1971) 20 Cal.App.3d 1054, 1060.) "The statute does not authorize prejudgment interest where the amount of damage, as

opposed to the determination of liability, ‘depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor.’ [Citation.]” (*Fireman’s Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1173.) ““““[T]he certainty requirement of [Civil Code] section 3287, subdivision (a), has been reduced to two tests: (1) whether the debtor knows the amount owed or (2) whether the debtor would be able to compute the damages.’ [Citation.]””” (*Ibid.*)

Here, CTL has not demonstrated that as of April 20, 2006, the amount of damages was certain or capable of being made certain. That is, CTL has not shown that on that date, Seneca was in a position to know or to compute the total amount it owed to CTL if found liable. On the contrary, we believe that on April 20, 2006, the amount of damages depended on issues of reasonableness relating to at least one of the settlement components. It was uncertain whether the distinct Mitch Brown component of the settlement was *reasonable* as a prerequisite to gaining the benefit of the evidentiary presumption as to that portion of the settlement. There was also a question of whether Seneca could defeat that component of the settlement, or perhaps the entire settlement, as collusive. In light of such issues and the likelihood there would be conflicting evidence at trial relating thereto, the total amount of damages was uncertain at the time of the settlement, and the parties would or should have understood that fact at that time. We conclude that CTL failed to demonstrate that the trial court abused its discretion in declining to award prejudgment interest from April 20, 2006. Accordingly, CTL’s effort by means of the instant cross-appeal to push back the time period of its award of prejudgment interest to that earlier date is rejected.

In so holding, we note that the trial court’s award of prejudgment interest commencing on the later date of February 22, 2007, is not at issue. Seneca’s appeal did not challenge the propriety of the trial court’s award of prejudgment interest. Therefore, any contention on Seneca’s part (in response to the cross-appeal) that no prejudgment

interest *at all* should have been awarded has been forfeited by Seneca. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361 [an appellant's failure to raise issue in opening brief results in waiver].) We have accordingly limited our analysis to the question of whether CTL has demonstrated, as cross-appellant, that the trial court abused its discretion in failing to select an earlier date for calculation of prejudgment interest, and we have answered that question in the negative.

B. Cost of Computer Operator

After entry of judgment and the filing by CTL of a memorandum of costs, Seneca filed a motion to tax or strike certain costs. One of the items of cost to which Seneca objected was CTL's expense of \$20,154 to have a computer operator at trial to assist counsel by projecting exhibits and other information onto a screen. The trial court granted the motion to strike the cost of the computer operator. CTL contends in its cross-appeal that the trial court abused its discretion. We disagree.

“‘[Code of Civil Procedure] section 1033.5, enacted in 1986, codified existing case law and set forth the items of costs which may or may not be recoverable in a civil action. [Citation.]’ [Citation.] An item not specifically allowable under subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if ‘reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.’ (§ 1033.5, subd. (c)(2).) [¶] ... Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion. [Citation.]” (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 773-774.)

The cost of a computer operator at trial does not fall into any of the categories of allowable costs, nor is it explicitly disallowed. Thus, the matter was in the trial court's discretion. We conclude the trial court's denial of the cost of having a computer operator at trial was not an abuse of discretion because such expense was not reasonably necessary to the conduct of the litigation, but was merely helpful or convenient. (Code Civ. Proc.,

§ 1033.5, subd. (c)(2).) Generally speaking, the expense of hiring a technician to operate state of the art technology as a means of facilitating the presentation and organization of exhibits at trial is a convenience, not a necessity. (See *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1104-1105.) Nor are we persuaded by CTL's arguments that the challenged computer operator expense should be treated as a form of attorney fees, paralegal fees or other necessary litigation expense. We find no abuse of discretion.

DISPOSITION

The judgment of the trial court is affirmed. Costs on appeal are awarded to CTL.

Kane, J.

WE CONCUR:

Gomes, Acting P.J.

Hill, J.